

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELATE JURISDICTION

WRIT PETITION NO.3635 OF 1998

1 Ashok Narayandas Bhanushali
2 Sandhya Ashok Bhanushali ...Petitioners

vs.

1 Chandraprabha Narayan Bhanushali
(since deceased by legal heirs)
1A) Smt.Rekha @ Rasimi Govindrao Gajwani
1B) Smt.Amita Timir Shah ...Respondents

Mr.D.S.Sawant for the petitioners
None for the respondents

CORAM :A.S.OKA,J.
DATE :JANUARY 4,2010

JUDGMENT :

1 The petitioners are the original defendants. By this writ petition under Article 227 of the Constitution of India, the challenge is to the decree dated 18th May 1998 passed in favour of the respondents-plaintiffs under section 6 of the Specific Relief Act,1963 (hereinafter referred to as the said Act).

2 According to the case made out by the respondents, the first respondent is the widow of late Narayandas H. Bhanushali. According to the case of the respondents the said Narayandas had married to one Rukmini who died in the year 1948. The 1st petitioner is the son of Narayandas born to the said Rukmini. According to the case of the respondents, after the demise of his first wife the said Narayandas came to Bombay in the year 1950-51 and he got married to the 1st respondent. According to the case of the respondents, the rent receipt in respect of the suit premises bearing room no. 7 on the first floor of building known as Tulsi Bhavan,

Mahalaxmi Compound, Bhulabhai Desai Road, Bombay 400 026 was earlier standing in the name of the brother of the 1st respondent. According to the case of the 1st respondent, after the said Narayandas arrived in Bombay, he had no place to reside and therefore, the first respondent and her brother allowed the said Narayandas to reside with them in the suit premises.

3 On the request made by the brother of the 1st respondent, the tenancy in respect of the suit premises was transferred by the landlord in favour of the said Narayandas and the said decision was communicated by the landlord by letter dated 28th December 1962. According to the case of the respondents, the first petitioner got married to the second petitioner in June 1976 and thereafter he shifted his residence to a premises at Bandra, Mumbai. The allegation is that as the second petitioner does not belong to the same cast as that of the first petitioner, the marriage was not accepted by the said Narayandas and therefore the said Narayandas did not allow the first petitioner to stay in the suit premises. It is alleged that after the petitioners shifted to Bandra, the respondents along with Narayandas were residing in the suit premises. The second respondent is the daughter of the first respondent and the third respondent is the husband of the second respondent. It is alleged that the second respondent is residing in the suit premises from the date of her birth. The said Narayandas expired on 10th June 1997. It is stated that after the demise of the said Narayandas, the petitioner shifted to room no.5 in the same building in which suit premises are situated. It is alleged that on 16th July 1997 a complaint was lodged by the respondents with the local police station about the threats given by the petitioners. It is alleged that the in July 1997 the

respondents had gone to Nalasopara for a week and they came back on 3rd August 1997. At that time, they noticed that the lock of the suit premises was removed and the petitioners were residing there. It is alleged that the respondents did not complain to the police station as there were some efforts made to amicably settle the matter. Thus, the allegation is that the respondents were dispossessed from the suit premises without following due process of law by the petitioners.

4 The petitioners filed the written statement and contested the suit. The petitioners denied that the first respondent (original plaintiff) was in exclusive possession of the suit premises. The petitioners denied that they had left the suit premises after their marriage. The petitioners contended that they were residing in the suit premises alongwith the said Narayandas at the time of his death.

5 The learned counsel for the petitioners submitted that the learned Trial Judge recorded a finding that even the 2nd and 3rd respondents cannot enter the suit premises as the same was under the control of the 1st respondent. He pointed out that the learned Trial Judge has disbelieved the case made out by the respondents that they were dispossessed on 3rd August 1997. He submitted that even after discarding the said case, the trial court has passed a decree under section 6 of the said Act. He submitted that taking the finding recorded on issue no.3 as it is, it is obvious that there was no evidence of dispossession by the petitioners. He pointed out the finding recorded by the trial court in paragraph 28 of the Judgment in which it was observed that even the 2nd and 3rd respondents cannot enter the suit premises unless and until the first respondent permits them to enter. He

pointed out that during the pendency of the petition, the first respondent expired on 2nd April 2004. He submitted that the petitioners by amending the petition has brought on record the daughters of the first respondent viz. 2nd respondent herein and one Smt.Rekha G. Gajwani as the heirs of the 1st respondent. He submitted that in view of clause (b) of sub section 2 of section 15 of the Hindu Succession Act,1956, the first petitioner is also a legal representative of the first respondent-plaintiff as even going by the case made out in the plaint, the original tenant was Narayandas who was the father of the first petitioner. He submitted that the impugned Judgment and Decree is perverse and going by the findings recorded by the learned Trial Judge the decree under section 6 of the said Act could not have been passed. He emphasised that the finding of the trial court is that even 2nd and 3rd respondents cannot enter the suit premises. He submitted that the exclusive possession of the original first respondent was not at all established.

6 I have considered the submissions. It is not in dispute that the 1st petitioner is the step son of the first respondent and the 2nd petitioner is the wife of the first petitioner. The second respondent is a daughter of the first respondent and the third respondent is the husband of the second respondent. As far as dispossession is concerned, the material averments are found in paragraph 12 of the plaint which read thus :

12...During the last week of July 1997 Plaintiffs and husband of the Plaintiff No.2 had gone to Nalasopara for a week to stay there as the Plaintiff No.1 was very much depressed due to death of her husband and health was deteriorating and under the advice

of doctor, she needed change of environment to improve her health. The Plaintiff No.1 refer and rely upon the medical certificate when produced. On 3rd August 1997 when the Plaintiffs came to the suit premises, they were surprised and shocked to see that the lock of the suit premises was changed and found that the Plaintiffs were residing there. When they approached the Defendant no.1 and asked him to let them enter into the suit premises and vacate the suit premises, the Defendant No.1 again threatened them that if they would enter the suit premises they had to face dire consequences. Then the Plaintiffs approached the other family members who told the Plaintiffs to resolve this matter amicably and also advised them not to go to the police station or to be court of law. The Plaintiffs were induced by the Defendant no.1 and other members of the family, not to approach any court of law but to settle the above matter amongst themselves...

7 In paragraph 6 of the plaint the respondents admitted that on the application made by the brother of the first respondent, the tenancy in respect of the suit premises was transferred in favour of the said Narayandas. At the time of his death, the said Narayandas was the tenant. Therefore, the 1st respondent can claim tenancy rights from her husband by inheritance. Even assuming that the 1st respondent became the tenant after the demise of Narayandas, after her demise, in view of clause (b) of sub section 2 of section 15 of the Hindu Succession Act, 1956, the first petitioner being the heir of his father Narayandas, he is

also entitled to inherit the rights in respect of the suit premises held by the first respondent. Thus, now the first petitioner can claim to be one of the heirs of the first respondent in so far as the suit premises are concerned.

8 In paragraph 27 of the Judgment, the learned Trial Judge has specifically disbelieved the case of the respondents that they were dispossessed on 3rd August 1997. In paragraph 27 of the Judgment, the learned trial Judge has held thus :

27. The plaintiffs are required to prove this issue also to succeed in the suit. Can they prove that they were dispossessed by the defendants on 3-8-97. On this point, the plaintiffs 1 and 2 asserted that on 3-8-97 they came to the suit room and found that they were dispossessed by the defendants. They also said that the defendants physically prevented them from entering the suit room. **There appears a little exaggeration in the plaintiffs account of the so-called incident of 3-8-97. Had this incident been so serious, the plaintiffs would certainly have lodged a police complaint about the same as they have lodged one such complaint earlier. Since this was the last straw on camel's back, they would not have avoided going to the police station. I am, therefore, not inclined to believe this incident of 3-8-97 as asserted by the plaintiffs.** But the fact remains that on 3-8-97 onwards, the defendants in their written statement invited her to reside in the suit room and expressed their no objection for her residing in the suit room.

This clearly shows that the defendants came in control of the suit room on or before 3-8-97. I have already recorded my finding that until 3-8-97 the defendants could not have resided in the suit room in the company of the plaintiff no.1 but today it is an admitted fact that they are using the suit room as their residence. **This means that after 16-7-97 but before 3-8-97 the defendants somehow took control of the suit room and they are now in a position to prevent the plaintiffs 2 and 3 from entering the same. I have already recorded above that the defendants were not residing in the suit prior to 16-7-97...**

(Emphasis added)

9 Thus, the case made out by the respondents as regards their dispossession on 3rd August 1997 has not been accepted by the trial court. It will be necessary to consider what is held by the trial court in paragraph 28 :

28...I am afraid this is not possible because the room was in exclusive control of the plaintiff no.1. It would remain as such and until she permits, even the plaintiffs 2 and 3 cannot enter the same. I am, therefore, giving my finding on Issue No.3 in affirmative.

10 Thus, the learned trial Judge found that even the 2nd and 3rd respondents who were original 2nd and 3rd plaintiffs had no right to enter the suit premises without permission of the first respondent.

11 The first respondent also admitted that till the date of his marriage, the first petitioner was residing in the suit premises. Thus, there is no clear evidence of dispossession of the respondents-plaintiffs. In any case, the case made out by the respondents about the dispossession on 3rd August 1997 has been completely disbelieved by the trial court.

12 As stated earlier, now the first petitioner is one of the legal representatives of the first respondent. Therefore, the decree passed in favour of the first respondent against the petitioner cannot be allowed to operate especially when it is held that the 2nd and 3rd respondents had no right to enter the suit premises without the permission of the 1st respondent. Apart from what is stated above, the first respondent did not establish her case of dispossession at the hands of the petitioners.

13 In view of the subsequent event of the date of death of the first respondent and taking the findings recorded by the trial court as it is, it is obvious that a decree under section 6 of the said Act will have to be set aside. Therefore, the petition must succeed.

14 Hence, I pass the following order :

- i) Impugned Judgment and decree is quashed and set aside and the suit filed by the respondents stands dismissed.
- ii) Subject to what is observed above, rule is made absolute in above terms. There will no order as to costs.

JUDGE